IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 442.

ANDIMO PAPPADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF.

1. Adamantly the Government insists that a prison term of two years is a reasonable sentence to be imposed on this petitioner. The Government's essential argument is nothing more than a baseless assertion that "we think the district court's judgment was a supportable one" (U. S. Brief, p. 46).

Earlier this Term, the Government purported to take a quite different position. Its brief in *Harris v. United States,* No. 6 this Term, bravely asserted (p. 65) that:

> "In the contempt area, therefore, there is no reason to fear that excessive uncorrectible punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court."

The Government's present brief shows that the "careful policing" is to consist of a superficial exercise in

sophistry. If the Government really believed that this Court can and should carefully police contempt sentences to correct excessive punishment, it would deal with the facts in the record relevant to sentence and not present to this Court baseless surmises of what might have been in the mind of the district court.

The Government's argument that this extraordinary sentence was reasonable wholly disregards the only facts that this Court has before it. Not a word is said about petitioner's age, occupation, and personal circumstances, cited on page 32 of Petitioner's Brief. The Government ignores the significance of petitioner's slight criminal record, a conviction as a juvenile which has been expunged by Presidential pardon. Nothing in petitioner's background is mentioned that could conceivably explain the harsh sentence that was imposed.

The Government does begin to discuss the nature of the offense; the introduction sounds promising. "The questions must be appraised in context in order to determine the seriousness of his contumacious behavior" (U. S. Brief, p. 45). The Government then proceeds to pass over the entire context of petitioner's refusal to answer.

Most startling of the Government's omissions is its total silence on the fact that, when petitioner refused to testify, there was a pending indictment in which he was charged with violation of the narcotics laws. Pendency of that indictment was central to the refusal of petitioner to answer the few questions. Until the prosecutor's questions turned to petitioner's relationship with his lawyers, he had been a truly cooperative witness, answering over one hundred and twenty-five questions. He refused to answer a few

questions only when he believed that interrogation into his relations with counsel and witnesses threatened to prejudice the posture of his defense against the indictment. Counsel for the petitioner expressly advised the district court that if that indictment were dismissed, "it certainly would influence the defendant in answering some of these particular questions" (R. 42a). In light of the importance that this indictment played in the petitioner's conduct and the events in the district court, it is beyond comprehension that the Government would argue to this Court the reasonableness of the sentence without any reference to the indictment and its consequences.

Actually the Government does not totally overlook the indictment against petitioner. In an obscure footnote in its statement of facts, the Government informs this Court that "the indictment against petitioner was recently dismissed" (U. S. Brief, p. 7, note 3). The Government might have been more explicit had they advised this Court that the indictment was dismissed in January 1966, after petitioner's brief had been filed in this case.

The Government's argument that a two-year sentence is reasonable also fails to mention other serious and well grounded legal bases for petitioner's few refusals to answer. Thus, petitioner offered a plausible challenge to those questions as not demonstrably pertinent to the announced subject of the Grand Jury investigation. He questioned the use of an immunity statute of limited scope should the Grand Jury seek freely to enlarge or change the subject under inquiry. Neither of these is given heed by the Government.

Strangely, in view of the Government's silence on petitioner's most basic legal objections to the few ques-

tions he refused to answer, the Government does refer to one objection, petitioner's fear of being whipsawed into a perjury prosecution. Here, however, silence would have been preferable. For the second time in this Court, the Government grossly misstates petitioner's argument. The Government's distorted version is that petitioner merely feared that he might contradict himself under oath and thus commit perjury (U. S. Brief, p. 45, note 14). The Government brushes aside the fact that, by the prosecutor's own assertion, he had sworn testimony implicating petitioner as a member of an illicit narcotics group. Petitioner flatly denied the truth of that charge under oath. This set the contradiction petitioner might reasonably fear could lead to a perjury prosecution, the contradiction between his statement and the sworn testimony said to be in the possession of the Government. (See Petitioner's Brief, pp. 30-31.)

In this Court, petitioner raised these various legal objections to the questions, not to establish their validity, but only to demonstrate that his refusals to answer a few questions were not a brazen refusal to cooperate. The existence of serious and unresolved legal doubts is highly relevant to the degree of petitioner's contumaciousness. Therefore, it is relevant to the immediate question of the reasonableness of the very harsh sentence imposed by the district court. On this argument, the Government is in total default.

While the Government pays no attention to the context of petitioner's refusals to answer as revealed in the record, it seeks to introduce other "background" facts for which there is no record support whatsoever. The Government is not above argument by invective, styling petitioner a "reluctant witness" from whom

testimony must be coerced (U. S. Brief, p. 45). The record shows the contrary, that petitioner was a fully cooperative witness who answered all questions until the prosecutor turned to the meetings with counsel. The Government tries by its own *ipse dixit* to establish that petitioner was withholding "significant testimony" in an investigation "involving a far-ranging narcotics conspiracy." (*Ibid.*)

The few questions that petitioner refused to answer cannot be described as dealing with "significant testimony" about any such conspiracy, real or imagined.

Petitioner formally refused to answer only five questions. In his main brief (p. 10), it was noted that petitioner had in fact answered the fourth question. (See R. 211a and R. 178a.) Petitioner had also answered the second question. (See R. 210a and R. 186a-187a.) The second question is substantially identical with the fifth question. In sum, petitioner effectively failed to answer only two questions: "Mr. Pappadio, who were the attorneys who were present at these meetings?" and "Who else was present at these meetings besides yourself, Lucchese and the attorneys?" These two questions, or even the five, hardly suggest "significant testimony" about a far-ranging narcotics conspiracy.

The two-year sentence cannot be upheld as a sentence for a narcotics offense. Stripped of that coloration, the sentence is patently excessive. Here a basically cooperative witness refused to answer a few questions. His reasons for refusal are not untenable, certainly not unreasonable. If two years is appropriate in such a case, what will the Government propose for a case of wilfully contumacious behavior? What of the wit-

ness who simply refuses to answer any questions? Petitioner has already endured substantial imprisonment. He has been put to the great expense of appeals through two appellate courts. This is more than enough punishment for his negligible misbehavior. His sentence ought to be reduced to no more than the time served.

2. The Government's Brief devotes itself mainly to an effort to prevent the recognition of a right to jury trial in criminal contempt cases. A few comments on that effort may be noted. First, the Government does not even try to argue that history supports a denial of jury trial on contempts not committed in the presence of the court. The elaborate study of colonial practice offered by the Government in the *Harris* case does not separate contempts in the courtroom, where speedy punishment may be necessary in order to vindicate the court's dignity and authority, from other contempts. The historical materials seem to show only that there was no colonial practice of jury trials in the former. This Court in *Harris* recognized that such contempts are properly dealt with summarily and without the intervention of a jury trial.

Second, the Government is led to a bizarre image of the role of jury trial in criminal prosecutions. According to the Government, the function of the jury is to nullify legislative commands, a situation that the Government finds not merely tolerable, but desirable. The Government so premises in order to contrast the undesirable situation if juries, i.e., instruments of nullification, are allowed to prevent the enforcement of judicial commands. For the Government seriously

to argue in this Court that nullification of either legislative or judicial mandates is the sole, or even an important, function of the jury is surely a measure of desperation. The jury is a proven instrument of justice, superior in many respects to professional judges. This does not make the jury an adversary of the judge. Nor does it make the jury an adversary of the legislature. The Government's argument rests upon a false premise and a meaningless contrast.

Third, this Court has failed in the recent past to declare a constitutional right to jury trial in contempt cases, other than contempts in the presence of the court, because of the weight of history. Mr. Justice Frankfurter recognized that "scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded". *Green v. United States,* 356 U. S. 165, 189 (1958). The Court was not then persuaded to correct a century and a half of legislative and judicial history based on such assumptions. Two years ago, this Court faced a similar error of long-standing, but forthrightly rejected the cases that rested on that rule. *Murphy v. Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964). It is equally imperative that this Court throw off the error that prevents recognition of the right to jury trial.

Respectfully submitted,

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